Federal Construction Co (Penang) Sdn Bhd v Chor Kai Gun

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–590 OF 2006
CHEW SOO HO JC
9 JUNE 2011

Contract — Breach — Damages — Exemplary damages — Defendant's act calculated to profit defendant at expense of plaintiff — Exemplary damaged awarded

Contract — Terms of contract — Representation/assurance — Representations and assurances given by defendant to plaintiff to induce plaintiff to invest in property development scheme — Whether valid contract arose — Whether defendant in breach of contract by failing to honour his undertakings — Contracts Act 1950 s 41

Equity — Equitable fraud — Unconscionable conduct — Representations and assurances given by defendant to plaintiff to induce plaintiff to invest in property development scheme — Failure of defendant to honour his undertakings — Whether breach of fiduciary duty to safeguard plaintiff's financial interests — Whether equitable fraud established

Evidence — Presumptions — Adverse inference under s 114(g) of the Evidence Act 1950 — Documents — Failure of defendant to tender statements of account within defendant's knowledge and access — Whether appropriate to draw adverse inference against defendant

Evidence — Standard of proof — Fraud — Standard of proof for fraud in civil proceedings — Beyond reasonable doubt

Sometime in September 1994, a meeting was held between the defendant and the plaintiff's chairman and director (SP2) where the defendant had given various representations and assurances to SP2 to be a shareholder of E Pindar International Ltd, a proposed company to be incorporated in the British Virgin Islands (Pindar) for the purpose of property development in Chengdu, China. Basing on those representations and assurances including a personal undertaking by the defendant that the plaintiff's share equity in Pindar would be realized together with the share of profits upon the completion of the proposed property development, the plaintiff paid a sum of USD565,000 for

25% share equity in Pindar which was duly incorporated on 27 September 1994. The defendant held 32.5% of share equity in Pindar and was its chairman and managing director. SP2 was made a director of Pindar. The remaining 42.5% of the share equity were taken up by the defendant's relatives. On 2 August 2000 SP2 was removed as director of Pindar without the knowledge and consent of the plaintiff. The plaintiff then came to know that the property development undertaken in Chengdu had been completed sometime towards the end of 2004. However, the plaintiff had not been given any report on the progress of the property development and the financial affairs or statements. The plaintiff also came to know that the defendant had caused no less than 70 units of shoplots developed to be registered in the names of his children and relatives. The plaintiff averred that the defendant's assurances were false as he intended only to secure plaintiffs financial support for Pindar's investment in China for purposes of obtaining profits and benefit to himself, his children and relatives at the expense of the plaintiff. From the defendant's computation of profit and cost analysis of the property development given to the plaintiff, the plaintiff estimated their shares of the profit from the property development to be no less than USD2,500,000 by conservative accounting. Therefore the plaintiff prayed, inter alia, for an order that the defendant pay the plaintiff the sum of USD565,000 being the 25% share equity in Pindar with interest, the share of profits in the property development in China of not less than USD2,500,00 with interest, damages, exemplary and/or aggravated damages and costs. The defendant denied any representations and assurances allegedly given by him.

Held, allowing the plaintiff's claim with costs:

(1) The defendant had given the representation and/or assurance that he would be personally involved and would take charge of the companies and their affairs, that would have led SP2 to believe that the money invested would be in safe hand. The representations and assurances as stated in SP2's evidence-in-chief were not challenged specifically through cross-examination of SP2 by the defence. This aspect was the most crucial part of the plaintiff's case which went to establish the personal liability of the defendant but it was not challenged. Hence, the evidence of SP2 relating to the representations and assurances which included the personal undertaking by the defendant and that upon such personal assurances and undertaking that plaintiff took up the 25% share equity in the company to be incorporated was deemed to have been an accepted fact by the defence; *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (M) Bhd* [2004] 2 MLJ 31 referred; *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC); *Paramill Sdn Bhd & Anor v Datuk Jospeh Pairin Ketingan* [2007] 7 MLJ 289 referred (see paras 17 & 18).

(2) There was a valid contract between the plaintiff and the defendant upon the payment of aggregate sum of USD565,000 by the plaintiff being the

plaintiff's capital contribution to Pindar in consideration of defendant's representations and assurances. Hence when the property development had been completed, the defendant was in breach of the contract when he failed and/or refused to honour his undertaking to realise the plaintiff's capital contribution and the share of profits; s 41 of the Contracts Act 1950 was applicable (see para 22).

(3) The standard of proof for fraud in civil proceedings as decided by Federal Court in *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 and *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301 is one that is beyond reasonable doubt. The irresistable inference to be drawn was that the defendant had willfully and/or intentionally failed or refused to honour his undertaking which led to prove beyond reasonable doubt that he intended to deceive the plaintiff. The irresistable inference which led to prove beyond reasonable doubt was that the companies were making profits but the defendant did not intend to share them with the plaintiff. Fraud was proved against the defendant (see para 24).

(4) The defendant owed a fiduciary duty to the plaintiff to safeguard the financial interests of the plaintiff. The conduct of the defendant was unconscionable conduct which established the essentials of an equitable fraud against the plaintiff (see para 25).

(5) There was no valid reason why no statements of account or profit and loss account which were within the defendant's knowledge and access were not enclosed in the bundle of documents to clarify the actual account. It was appropriate to draw an adverse inference under s 114(g) Evidence Act 1950 against the defendant that any account of the said property development, if produced would not be favourable to the defendant (see para 31).

(6) The breach of the defendant towards the plaintiff and that the defendant's failure to account the share of profits of the plaintiff was probably none other than to calculate to make or to result in a profit to the defendant at the expense of the plaintiff. It was appropriate to award exemplary damages in this case. A sum of USD200,000 was a fair and reasonable sum to be awarded to the plaintiff as exemplary damages; this sum was moderate and not excessive but sufficient to serve its punitive purpose; *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610 (CA) (see para 32).

[Bahasa Malaysia summary

Sekitar bulan September 1994, satu mesyuarat telah diadakan antara defendan dan pengerusi dan pengarah plaintif ('SP2') di mana defendan telah memberikan pelbagai representasi dan jaminan kepada SP2 untuk menjadi pemegang saham E Pindar International Ltd, sebuah syarikat yang dicadangkan untuk diperbadankan di British Virgin Island ('Pindar') bagi

tujuan pembangunan hartanah di Chengdu, China. Berdasarkan representasi dan jaminan tersebut termasuklah akujanji peribadi oleh defendan bahawa ekuiti saham plaintif di Pindat akan direalisasikan bersama dengan saham keuntungan selepas siap pembangunan hartanah yang dicadangkan itu, plaintif membayar sejumlah USD565,000 bagi 25% ekuiti saham dalam Pindar yang telahpun diperbadankan pada 27 September 1994. Defendan telah memegang 32.5% ekuiti saham dalam Pindar dan merupakan pengerusi dan pengarah urusannya. SP2 telah dijadikan pengarah Pindar. Baki 42.5% ekuiti saham telah diambil oleh saudara-mara defendan. Pada 2 Ogos 2000 SP2 telah dilucutkan sebagai pengarah Pindar tanpa pengetahuan dan persetujuan plaintif. Plaintif hanya mengetahui bahawa pembangunan hartanah yang dijalankan di Chengdu telah siap menjelang akhir tahun 2004. Walau bagaimanapun, plaintif tidak memberikan apa-apa laporan berhubung prestasi pembangunan hartanah dan urusan atau penyata kewangan. Plaintif juga dapat mengetahui tentang defendan telah menyebabkan tidak kurang daripada 70 unit lot kedai yang dimajukan telahpun didaftarkan dalam nama anak dan saudara-maranya. Plaintif menegaskan bahawa menegaskan bahawa jaminan defendan adalah palsu kerana dia berniat hanya untuk mendapatkan sokongan kewangan plaintif-plaintif untuk pelaburan Pindar di China bagi tujuan memperoleh keuntungan dan faedah untuk dirinya sendiri, anak-anak dan saudar-maranya melalui plaintif. Berdasarkan pengiraan keuntungan dan analisis kos defendan berhubung pembangunan hartanah yang diberikan kepada plaintif, plaintif menganggarkan saham keuntungan mereka daripada pembangunan hartanah tersebut adalah tidak kurang daripada USD2,500,000 melalui perakaunan konservatif. Oleh itu plaintif memohon, antara lain, perintah agar defendan membayar plaintif sejumlah USD565,000 yang merupakan 25% daripada ekuiti saham dalam Pindar dengan faedah, saham keuntungan dalam pembangunan hartanah di China tidak kurang daripada USD2,500,000 dengan faedah, ganti rugi, ganti rugi teladan dan/atau tambahan dan kos. Defendan menafikan apa-apa representasi dan jaminan yang dikatakan telah diberikan kepadanya.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Defendan telah memberikan representasi dan/atau jaminan bahawa dia akan secara peribadi terlibat dan akan menguruskan syarikat-syarikat dan urusan mereka, yang membawa kepada SP2 mempercayai bahawa wang yang dilaburkan berada dalam keadaan selamat. Representasi dan jaminan sebagaimana yang dinyatakan dalam pemeriksaan utama SP2 tidak dicabar secara khusus melalui pemeriksaan balas SP2 melalui pembelaan. Aspek ini merupakan bahagian paling penting dalam plaintif bagi membuktikan liabiliti peribadi defendan tetapi ia tidak dicabar. Justeru itu, keterangan SP2 berkaitan representasi dan jaminan yang termasuk aku janji peribadi defendan dan berdasarkan jaminan dan aku janji peribadi tersebutlah plaintif mengambil 25% ekuiti saham dalam

syarikat tersebut yang diperbadankan adalah dianggap fakta yang diterima oleh pembelaan *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (M) Bhd* [2004] 2 MLJ 31; *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 dan *Paramill Sdn Bhd & Anor v Datuk Jospeh Pairin Ketingan* [2007] 7 MLJ 289 dirujuk (lihat perenggan 17 & 18).

(2) Terdapat kontrak sah antara plaintif dan defendan selepas bayaran jumlah agregat USD565,000 oleh plaintif yang merupakan sumbangan modal plaintif kepada Pindar sebagai balasan representasi dan jaminan defendan. Justeru itu apabila pembangunan hartanah tersebut telah siap, defendan telah melanggar kontrak apabila dia gagal dan/atau enggan menepati aku janjinya untuk merealisasikan sumbangan modal plaintif dan saham keuntungan; s 41 Akta Kontrak 1950 adalah terpakai (lihat perenggan 22).

(3) Piawai bukti untuk fraud dalam prosiding sivil sebagaimana diputuskan oleh Mahkamah Persekutuan dalam kes *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 dan *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301 adalah suatu yang melampaui keraguan munasabah. Inferens yang tidak dapat dibendung adalah bahawa defendan telah dengan sengaja dan/atau niat gagal atau enggan menepati akujanjinya yang membawa kepada pembuktian melampaui keraguan munasabah bahawa dia berniat untuk menipu plaintif. Inferens yang tidak boleh disangkal yang membawa kepada pembuktian melampaui keraguan munasabah adalah bahawa syarikat-syarikat tersebut telah membuat keuntungan tetapi defendan tidak berniat untuk berkongsinya dengan plaintif. Fraud telah dibuktikan terhadap defendan (lihat perenggan 24).

(4) Defendan mempunyai kewajipan fidusiari terhadap plaintif untuk melindungi kepentingan kewangan plaintif. Perbuatan defendan merupakan perbuatan yang tidak boleh diterima yang membuktikan elemen fraud bersifat ekuiti terhadap plaintif (lihat perenggan 25).

(5) Tiada alasan sah kenapa penyata akaun atau akaun untung rugi yang dalam pengetahuan dan akses defendan tidak dikemukakan dalam ikatan dokumen untuk menjelaskan akaun sebenar. Adalah bersesuaian untuk membuat inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap defendan bahawa apa-apa akaun berhubung permbangunan hartanah, jika dikemukakan tidak berpihak kepada defendan (lihat perenggan 31).

(6) Pelanggran defendan terhadap plainti dan bahawa kegagalan defendan untuk mengemukakan saham keuntungan plainti berkemungkinan tidak lain daripada hanya mengira untuk membuat atau menghasilkan keuntungan terhadap defendan berasaskan plaintif. Adalah sesuai untuk

memberi award ganti rugi teladan dalam kes ini. Sejumlah USD200,000 adalah jumlah yang adil dan munasabah untuk diawardkan kepada plaintif sebagai ganti rugi teladan; jumlah ini sderhana dan tidak melampau tetapi mencukupi untuk tujuan punitif *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610 (CA) dirujuk (lihat perenggan 32).]

Notes

For cases on damages, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3022–3059.

For cases on fraud, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2648–2649.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417; [1995] 4 CLJ 551, CA (refd)

A Company (No 00370 of 1987), Re (1988) BCLC 570 (refd)

Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 CLJ 1, FC (folld)

Bell Group Ltd (In liquidation),The v Wetspac Banking Corporation (No 9) (2009) 70 ACSR 1 (Australia); [2008] WASC 239, SC (refd)

Boustead Trading Sdn Bhd v Arab-Malaysia Sdn Bhd [1995] 3 MLJ 331, CA (refd)

Broome v Cassell & Co Ltd [1972] AC 1027, HL (folld)

Daniels and Others v Daniels and Others [1978] Ch 406, Ch D (refd)

Ebrahimi v Westbourne Galleries Ltd & Ors [1973] AC 360, HL (refd)

Edwards and Another v Halliwell and Others [1950] 2 All ER 1064, CA (refd)

Foss v Harbottle [1843] 2 Hare 461; (1843) 67 ER 189 (refd)

Fui Lian Credit & Leasing Sdn Bhd v Kim Leng Timber Sdn Bhd & Ors [1991] 2 CLJ (Rep) 614, CA (refd)

Huo Heng Oil Co (Em) Sdn Bhd v Tang Tiew Yong [1987] 1 MLJ 139, ACJ (refd)

Jaafar bin Shaari & Anor v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd)

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170, PC (refd)

Kris Angsana Sdn Bhd v Eu Sim Chuan & Anor [2007] 5 MLJ 13; [2007] 4 CLJ 293, CA (folld)

Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610; [2009] 5 CLJ 1, CA (folld)

Norvabron Pty Ltd (No 2), Re (1986) 11 ACLR 279, SC (refd)

Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81; [2008] 2 CLJ 369, CA (refd)

Paramill Sdn Bhd & Anor v Datuk Jospeh Pairin Ketingan [2007] 7 MLJ 289; [2007] 6 CLJ 192, CA (refd)

Re Posgate & Denby (Agencies) Ltd [1987] BCLC 8 (refd)

Rookes v Barnard [1964] AC 1129, HL (folld)

Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Seang & 4 Ors [2008] 1 MLJ 27, CA (refd)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31, CA (refd)
Takako Sakao v Ng Pek Yuen & Anor [2010] 2 MLJ 181; [2010] 1 CLJ 381, FC (refd)
Tan Guan Eng v Ng Kweng Hee [1992] 1 MLJ 487, HC (refd)
Ting Chong Maa v Chor Sek Choon [1989] 1 MLJ 477, HC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Contracts Act 1950 ss 2(d), 41
Evidence Act 1950 s 114(g)
Rules of the High Court 1980 O 18 r 13(2), (3)

JA Yeoh (Tan Ruoh Chyi with him) (Shearn Delamore & Co) for the plaintiff.
Gan Techiong (Gan & Lim) for the defendant.

Chew Soo Ho JC:

BRIEF FACTS

[1] I have delivered my oral judgment of this case on 9 June 2011 and I now append below my full decision.

[2] Sometime in September 1994, a meeting was held at Mutiara Hotel, Penang between the defendant and the plaintiff's chairman and director, Tan Sri Dato' Paduka William Chek Lin Kwai (Wiliam Chek) in the presence of two others where defendant had given various representations and assurances to William Chek to be a shareholder of Pindar International Ltd, a proposed company to be incorporated in the British Virgin Islands (Pindar) for the purpose of property development in Chengdu, China. Basing on those representations and assurances including a personal undertaking by the defendant that the plaintiff's financial contributions which represents the share equity in Pindar to be incorporated, would be realised together with the share of profits upon the completion of the proposed property development in China, the plaintiff paid a sum of USD565,000 for the 25% share equity in Pindar which was duly incorporated on 27 September 1994. The defendant held 32.5% of share equity in Pindar and is its chairman and managing director. William Chek of the plaintiff was made a director of Pindar. The remaining 42.5% of the share equity were taken up by the defendant's relatives.

[3] Sometime in October 1994, Pindar had entered into a joint venture with Minyuan Realty Development Office, Chengdu, China to undertake property development in Chengdu. As a result of the joint venture, a company known as Chengdu Youlian Real Estate Development Co Ltd China (Chengdu Youlian) was formed in China with Pindar holding 80% of the share equity while Minyuan Realty Development Office held the remaining 20%, for the property development in Chengdu, China. The defendant was also the managing director and legal representative of Chengdu Youlian

[4] On 28 August 1995, a shareholders' meeting of Pindar was held in Singapore attended by the defendant, William Chek on behalf of the plaintiff, shareholders Sim Seng Quee and Tay Seow Joo. It was agreed that the initial capital of Pindar of USD2,260,000 was to be paid progressively to ChengduYoulian as Pindar's share of investment and a sum of USD1,000,000 shall be raised by Pindar as a loan to Chengdu Youlian for the property development. By a shareholders' loan agreement dated 2 January 1996, all shareholders agreed to advance the USD1,000,000 proportionate to their respective shareholdings. Between 29 May 1996 and 16 October 1997, the plaintiff had remitted a total sum of USD247,000 to the personal bank account of the defendant and the bank account of Pindar in China, being the plaintiff's loan contribution. However, the plaintiff was not advised or being given any confirmation by the defendant whether he and his relatives had accordingly made the loan contributions pursuant to the shareholders' loan agreement.

[5] On 2 August 2000, the plaintiff's chairman and director, William Chek was unanimously removed as director of Pindar with immediate effect in a shareholders' meeting without the knowledge and consent of the plaintiff.

[6] The plaintiff came to know through its lawyer in China that the property development undertaken by Chengdu Youlian in Chengdu, China had been completed sometime towards the end of 2004. However, the plaintiff had not been given any report from Pindar or from the defendant on the progress of the property development undertaken through Chengdu Youlian and the financial affairs or statements despite requests having been made vide letters and personal visits. The plaintiff also came to know that the defendant had caused no less than 70 units of shoplots developed through Chengdu Youlian to be registered in the names of his children and relatives.

[7] Sometime in May 2006, the plaintiff had lodged a claim at the Chengdu Middle Class People's Court for the recovery of the said loan of USD247,000. As a consequences of this claim, Pindar had entered into a repayment agreement dated 29 May 2006 with the plaintiff and pursuant to this repayment agreement, plaintiff had received the repayment sum of USD247,000 partly in cash and partly in commercial properties developed by Chengdu Youlian. On 30 November 2010, Chengdu Youlian had been approved by the Chengdu City Industry and Commerce Bureau for its deregistration.

[8] The plaintiff averred that that the defendant had over the years conveyed to William Chek its chairman and director that the development and sales were progressing well in view of the prime location and the property boom in China. Hence there is no reason for the defendant not to honour his obligations and assurances. The plaintiff contended that the defendant's assurances were false as he intended only to secure plaintiff's financial support for Pindar's investment in China for purposes of obtaining profits and benefit to himself, his children and relatives at the expense of the plaintiff.

[9] From the defendant's computation of profit and cost analysis of the property development given to the plaintiff, the plaintiff estimated their shares of the profit from the property development to be no less than USD2,500,000 by conservative accounting.

[10] Therefore the plaintiff prays, inter alia, for an order that the defendant do pay the plaintiff the sum of USD565,000 being the 25% share equity in Pindar with interest, the share of profits in the property development in China through Chengdu Youlian of not less than USD2,500,00 with interest, damages, exemplary and/or aggravated damages and costs.

[11] In the defendant's amended statement of defence, he had denied any representations and assurances allegedly given by him. With the issuance of 475,000 shares of Pindar to the plaintiff, the defendant contended that plaintiff had received consideration for the payment of USD565,000. On the plaintiff's pleading of the defendant's refusal to honour the plaintiff's contribution and entitlement to the share of profits from the property development in breach of his obligations, representations and assurances, the defendant averred that the allegations were false and calculated to formulate a cause of action against the defendant. The defendant had nevertheless failed to appear in the trial of this suit and had not testified nor called any witness in defence. In short, no evidence was adduced by the defendant.

THE ISSUE

[12] The principal issue in this case is whether the defendant had made any personal representations and assurances to the plaintiff through the plaintiff's chairman and director, William Chek, which included the defendant's personal undertaking of the realisation of the plaintiff's capital contribution of USD565,000 together with the share of the profits upon the completion of the property development in Chengdu, China, to persuade the plaintiff to take up 25% share equity in Pindar for the purpose of the investment in property development in Chengdu, China. If he had and when he had failed to honour his personal undertaking, was he in breach of his personal representations and assurances and/or had he committed fraud on the plaintiff? Finally, is the defendant liable to the plaintiff for damages in terms of the plaintiff's capital contribution and the plaintiff's share of the profits in the property development in Chengdu, China and for exemplary damages?

THE EVALUATION AND FINDINGS

Were there personal representations and assurances including personal undertaking by the defendant to the plaintiff?

[13] The gist of the evidence of the plaintiff through its chairman and director, William Chek (SP2), its China lawyer, Xing Lian Chao (SP1) and two other witnesses is primarily as recapitulated in the brief facts above. The principal witness of the plaintiff ie SP2 vide his witness statement, exh P11, showed that SP2 and the defendant had known each other very well as the defendant was the plaintiff's architect for the plaintiff's housing project between 1968 till late 1980. When the defendant and SP2 met at Mutiara Hotel, Batu Ferringhi, Penang in September 1994 together with Mr and Mrs Moses Lee Ming Yong, the defendant had proposed to incorporate a company in British Virgin Islands to undertake property development in Chengdu, China in joint venture with a company in China. He further proposed that the plaintiff could take up 25% share equity and be made a director of the company, that the defendant himself would take up 32.5% of the share equity and would be the chairman and managing director of the company while his relatives would take up the balance of 42.5% of the share equity of the company. SP2 was not too receptive to the defendant's proposal since the plaintiff was not familiar with the property market in China. The defendant, however, asserted that there was no cause to worry as it was common knowledge that there was a huge demand for shophouses in Chengdu, China and that he would be personally involved in the proposed property development to ensure its success. According to SP2 vide P11 Q&A 12, the

defendant was very confident about the proposed property development and assured SP2 of the following:

(a) that he/the defendant himself would be the chairman and managing director of the company to be incorporated in the British Virgin Islands;

(b) that he/the defendant himself would be the chairman and managing director of the company to be incorporated in China to undertake the property development;

(c) that he himself would be personally responsible for all the affairs, business and financial included of both companies;

(d) that he himself would personally ensure that the plaintiff's capital contribution together with the share of profits would be realised upon completion of the property development, and that at the very least the plaintiff's capital contribution would be returned in the event that the property development was not completed for whatever reasons; and

(e) that SP2, as representative of the plaintiff, shall be a director of the company to be incorporated in the British Virgin Islands and shall remain so until the plaintiff's capital contribution is returned at the very least.

[14] Upon the defendant's assurances that defendant would be personally involved in all the affairs of both companies and that he would personally undertake the return of the plaintiff's capital contribution together with the share of profits upon completion of the property development, SP2 told defendant that the plaintiff would take up the 25% share equity in the company to be incorporated in the British Virgin Islands equivalent to 475,000 ordinary shares at USD1 per ordinary share (see P11 Q&A 13–14). Following that, Pindar was incorporated in the British Virgin Islands on 27 September 1994. The plaintiff, at the request of the defendant then remitted the aggregate sum of USD565,000 to the personal bank account of the defendant and the bank account of Pindar vide telegraphic transfers as shown in bundle B pp 204–205, 207–208, 210, 212–213, 215–216, 218, 220, 222 and 224 and the defendant had signed the confirmation of receipt of all the remittances above vide bundle B pp 203, 206, 209, 211, 214, 217, 219, 221 and 223. On this sum of USD565,000 being the plaintiff's capital contribution in Pindar, there is no denial nor any dispute by the defendant. I am satisfied that plaintiff had duly proved this said sum having been remitted to and confirmed receipts by the defendant as the plaintiff's capital contribution.

[15] Subsequent to the incorporation of Pindar, SP2 was told at the shareholders' meeting of Pindar on 28 August 1995 in Singapore that Pindar had in October 1994 entered into a joint venture with Minyuan Realty Development Office, Chengdu, China to set up a company known as

Chengdu Youlian to undertake property development and the authorised share capital of Chengdu Youlian was RMB26,000,000 which had been paid up. Pindar held 80% share equity in Chengdu Youlian while Minyuan Realty Development Office, Chengdu held the remaining 20%. The said shareholders' meeting had discussed, inter alia, an anticipated shortage of USD1,000,000 for the property development in China and the shareholders agree to raise a loan for Chengdu Youlian. On 2 January 1996, a shareholders' loan agreement between the shareholders and Pindar was signed to raise the loan for Chengdu Youlian. For the plaintiff's loan contribution in the total sum of USD247,000, the plaintiff had duly paid between 29 May 1996 and 16 October 1997. This sum of payment was not disputed. It had in fact been repaid to the plaintiff partly in cash and partly in commercial properties after the plaintiff had filed a claim in Chengdu Middle Class People's Court. This sum which had been repaid is indeed non-issue but it is important to show the sequence of events.

[16] Photographs in bundle B pp 184–192 show that property development had been carried out by Chengdu Youlian and the project had been completed and that the shoplots have been occupied with businesses being operated.

[17] Looking at the whole sequence of events that had taken place in this case commencing from the defendant persuading the plaintiff through SP2 to take up share equity in a company to be incorporated followed by the incorporation of Pindar in British Virgin Islands and the subsequent joint venture of Pindar with Minyuan Realty Development Office of Chengdu leading to the incorporation of Chengdu Youlian which undertook property development till the completion of the development and the ultimate deregistration of Chengdu Youlian, I find this sequence of events to be consistent with the basis of the initial meeting between the defendant and SP2 at Mutiara Hotel Penang. The question is whether the defendant in attempting to convince the plaintiff through SP2 to take up 25% share equity in Pindar had given his assurances and representations to SP2, particularly with his personal undertaking that he (the defendant) himself would be personally responsible for all the affairs, businesses and financial included of Pindar and Chengdu Youlian and that he would personally ensure the plaintiff's capital contribution together with the share of profits upon completion of the property development in China, would be realised. I find from the fact which is unchallenged and undenied that the defendant was the chairman and managing director of Pindar and also the managing director and legal representative of Chengdu Youlian; this is indeed in line and consistent with the evidence of the plaintiff particularly through SP2 that that was one of the representations and/or assurances given by the defendant that the defendant would be personally involved to undertake the whole property development. The defendant was a friend of long standing of the plaintiff or SP2 being the architect for the plaintiff's projects for the past

many years. Such relation would probably have garnered the plaintiff's trust and confidence in the defendant. Therefore when the defendant had given the representation and/or assurance that he would be personally involved and would take charge of the two companies and their affairs, that would, to this court, have led SP2 to believe that the money invested would be in safe hand. From the facts and documentary evidence of the case, I am satisfied that it is a fact that the defendant had been personally and directly involved in Pindar and Chengdu Youlian which were the two companies which undertook the whole property development in China as can be seen in the various important documents that the defendant had personally signed as submitted in paragraph 21 of the plaintiff's written submission. Reverting to the representations and assurances as stated in SP2's evidence-in-chief vide P11 (witness statement) Q&A 12, 13 and 14, there was no challenge specifically through cross-examination of SP2 by the defence. This aspect seems to be the most crucial part of the plaintiff's case which goes to establish the personal liability of the defendant but it was not challenged. In *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31 (CA), His Lordship Alaudin JCA (as he then was) said at p 36:

> … Thus it must be accepted that the failure to cross-examine the defendants on important aspects of their evidence must be treated as acceptance of those parts of their evidence …

[18] See also *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC); *Paramill Sdn Bhd & Anor v Datuk Jospeh Pairin Ketingan* [2007] 7 MLJ 289; [2007] 6 CLJ 192, 215 (CA). Hence, the evidence of SP2 vide Q&A 12, 13 and 14 of P11 which relates to the representations and assurances which include the personal undertaking by the defendant and that upon such personal assurances and undertaking that the plaintiff took up the 25% share equity in the company to be incorporated in British Virgin Islands, must be deemed to have been an accepted fact by the defence. Much emphasis had been canvassed by learned counsel for the defendant on the contradiction in SP2's evidence when in P11 Q&A 13, SP2 stated that he told the defendant at the meeting at Mutiara Hotel that the plaintiff would take up 25% share equity in the company to be incorporated but said in cross-examination that after he met the defendant in Penang, he was invited by the defendant and went to Chengdu but he was still not very keen or serious. It was submitted that there was therefore no contract concluded at the meeting at Mutiara Hotel, Penang and there was no reliance on the defendant's representations and assurances contending that SP2 had conducted feasibility study before the investment. I find in fact that there was no evidence of actual feasibility study allegedly conducted except that SP2 had visited Chengdu on the invitation by the defendant. This court cannot ignore the fact that the plaintiff had remitted the 25% share equity as a result of the meeting in Penang and there is no evidence that SP2 and/or the plaintiff had not relied on the defendant's assurances nor

was there evidence that such assurances were retracted. The payment of the 25% share equity indicates none other than the acceptance of the defendant's offer in Penang as well as the consideration thereof. Contract is undoubtedly concluded. In any event, the defendant did not testify to rebut these representations and assurances including the said personal undertaking that he had given to SP2 to convince the plaintiff to take up the share equity in the company which was subsequently incorporated as Pindar. There was also no evidence at all led by the defence to cast any doubt or to rebut the existence of such personal representations and assurances of the defendant. In *Takako Sakao v Ng Pek Yuen & Anor* [2010] 2 MLJ 181; [2010] 1 CLJ 381, the Federal Court set out the principle of law in circumstances when the defendant who was fully conversant with the facts but had refused or failed to attend court and give evidence when it held, inter alia, as follows:

> (1) Two consequences followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. Firstly, the evidence given by the appellant ought to have been presumed to be true. The judge was under a duty to accept the appellant's evidence as true in the absence of any evidence from the first respondent going the other way. His failure to direct himself in this fashion thereby occasioned a serious miscarriage of justice. Secondly, the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. The trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point amounted to a misdirection which occasioned a miscarriage of justice.
>
> …: per Gopal Sri Ram FCJ.

[19] See also *Jaafar bin Shaari & Anor v Tan Lip Eng & Anor* [1997] 3 MLJ 693 (SC); *Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 (CA). The law is well explained by His Lordship Gopal Sri Ram FCJ as quoted above. In the circumstances, I must hold that in the absence of any evidence from the defendant stating the contrary, the evidence of the plaintiff through SP2 in this respect must be accepted as true and that an adverse inference must be drawn against the defendant on the existence of the defendant's representations and assurances including his personal undertaking as shown in the evidence-in-chief of SP2 referred to above upon which the plaintiff relied on and acted to join as shareholder with 25% equity in Pindar. Consequently, I hold that the defendant had made the representations and assurances including his personal undertaking that the plaintiff's capital contribution together with the share of

profits would be realised upon the completion of the property development in China and that at the very least the plaintiff's capital contribution would be returned in the event that the property development is not completed for whatever reasons. Upon this vital evidence having been found to have existed and acted upon by the plaintiff with the aggregate sum of USD565,000 being subsequently remitted to the defendant and/or Pindar and with the property development undertaken by Chengdu Youlian, a company set up by Pindar with the joint venture party in Chengdu, China which was under the control of the defendant, being carried out and completed, the defendant ought to have realised the plaintiff's capital contribution together with the share of profits from the property development thereof. The defendant had however failed to honour his personal assurances and undertakings. I find that there is ostensibly a breach by the defendant.

[20] Learned counsel for the defendant in his submission upon the defence's election to submit of no case to answer after having acknowledged that the defendant understood the warning and the consequences of such election, submitted that no contract whether oral or in writing had been concluded between the plaintiff and the defendant at the meeting at Mutiara Hotel as SP2 was not very serious about the defendant's proposal. He contended that there was no contract between the plaintiff and the defendant but the contract was between the plaintiff and Pindar. Assurances were given to SP2 personally and not to any company. He also contended that there was no company resolution from the plaintiff to depart money for the investment nor any record from the plaintiff for 1994 being adduced and there is no letter to say that the plaintiff had relied on the defendant's assurances. I find this argument by learned counsel for the defendant to lack merit and is seen as an attempt to hair-split by his submission, it is apparent that he admitted that the defendant had given his assurances but they were given to SP2 and not the plaintiff. Nevertheless, learned counsel seemed to ignore and disregard the fact that there had never been any evidence to show any dealings between the defendant and SP2 in the personal capacity of SP2. Evidence of SP2 showed that the previous dealings with the defendant were between the plaintiff which was and is involved in property development and the defendant as the architect for plaintiff's projects. Taking into account the long relationship between the defendant and SP2, the defendant must know that SP2 was the chairman and director of the plaintiff ie its alter ego. Hence assurances given to SP2 were virtually given to the plaintiff. In any event, the defendant had never pleaded that the plaintiff was never a party but that any contract if it did arise, was only between the defendant and SP2. The defendant is thus barred from raising this in argument. The defendant had never denied that the money in the sum of USD565,000 were not from the plaintiff but from SP2 personally and he had happily acknowledged receipt for all those remittances from the plaintiff. That being the case, it has been the accepted fact that it was the plaintiff and not SP2 individually who paid up that sum of money being the 25% of the share equity

in Pindar. Thus, it is absolutely baseless for learned counsel for the defendant to argue that there was no resolution or record from the plaintiff to depart with the money when the money had been duly acknowledged to have been received by the defendant from the plaintiff. There was moreover no cross-examination on SP2 to produce the plaintiff's resolution and other record pertaining to the release of the aforesaid sum of money. When the defence did not deem fit to ask SP2 to produce the plaintiff's resolutions and record for the payment out of the said capital contribution in Pindar, it must be deemed that the defence had accepted that the money paid out was proper and in accordance with company procedure. The fact that money had been remitted by the plaintiff and received by the defendant and/or Pindar, is not disputed by the defendant. Hence, if the defendant wanted to challenge that the payments made were not from the plaintiff, he had to, in the first place, plead so, and secondly, he must challenge the principal witness of the plaintiff to produce the company resolution and other relevant records. But if he failed to do so, there is no valid ground for him to raise that the plaintiff had not produced the company resolution and records when he did not challenge. I hold that defence in the circumstances ought to be estopped from raising such issues in submission. On the submission that the plaintiff and SP2 did not rely on the assurances, learned counsel for the plaintiff submitted that the defendant is bound by his personal representations and assurances and is in no position to go back on them when the plaintiff had acted on those representations and assurances upon the payment of USD565,000 being the capital contribution and the subsequent loan contribution of USD247,000 citing in support *Boustead Trading Sdn Bhd v Arab-Malaysia Sdn Bhd* [1995] 3 MLJ 331 (CA). I agree that when the defendant gave his representations and assurances which led the plaintiff through SP2 to proceed to act on the basis of an underlying assumption that the defendant would honour his representations and assurances, neither parties will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. The mere fact that SP2 might have conducted a feasibility study when he visited Chengdu does not detract from the underlying assumption which persuaded the plaintiff to participate, that is through the defendant's representations and assurances. The defendant cannot be permitted to resile or dissect what he had represented and assured after he or Pindar had received the plaintiff's capital contribution.

[21] Learned counsel for the defendant also raised the question of SP2's or the plaintiff's complaint of not receiving any account of the company which is a complaint by a shareholder against the director and submitted that the onus is on the plaintiff to file an action in the High Court in British Virgin Islands for account on ground of oppression on minority. He further contended that Pindar and Chengdu Youlian were separate legal entity and the plaintiff's interest is only in Pindar. I find the submission that the plaintiff ought to file an action in British Virgin Islands for account is misconceived. The amended statement of claim of the instant case does not seek for an account of Pindar but

that the defendant had not provided the account to show the financial status of the company which the defendant as a chairman and director of Pindar could have easily done so if he was sincere about it bearing in mind that he had given his undertaking to realise the share of profits of the company. Further, SP2 was removed as a director of Pindar without his knowledge and consent which had deprived him of any board meeting and of any account reports. Had the defendant heeded the requests by the plaintiff and had duly supplied the account which according to SP2, if shown to be non-profiting or otherwise, he would accept it, there would then be no cause of complaint. However, the defendant had apparently turned a deaf ear and passed a resolution to remove the plaintiffs' chairman (SP2) as a director of Pindar behind his back and failed to supply the necessary account though requested. Even for the purpose of this trial, the defendant had still failed to file any documents showing the account of Pindar and Chengdu Youlian and the financial performances of these two companies. The reasonable inference is that the defendant is having some hidden agenda in not disclosing the accounts of the companies. Be that as it may, this court is not asked to order the companies to disclose the account and hence there is no issue of the proper court of jurisdiction that the plaintiff should go to. On the contention of separate legal entity of Pindar and Chengdu Youlian, again, learned counsel for the defendant seems to ignore in total the fact of the incorporation of Pindar and the subsequent incorporation of Chengdu Youlian as well as the fact that Pindar held 80% of the share equity in Chengdu Youlian. Pindar was the investment vehicle of Chengdu Youlian. Although they may be separate entity being incorporated in different nations, the fact that Pindar being the major shareholder and in control of Chengdu Youlian through the defendant cannot be disregarded. The formation of Pindar was solely for the property development in China through the company formed there ie Chengdu Youlian. The success of the property development and the profits arising therefrom in Chengdu Youlian would be the success and profits of Pindar. I do not see the rationale of this argument nor its merit.

[22] On the existence of a concluded contract between the plaintiff and the defendant, the plaintiff submitted that the concluded contract is founded on the aggregate payment of USD565,000 to Pindar in reliance upon and in consideration of the defendant's representations and assurances through SP2 as had been duly pleaded by the plaintiff but the defendant had merely denied in his amended defence without any traverse or assertion of no concluded contract between the plaintiff and the defendant thereby breaching O 18 r 13(3) of the RHC citing *Bullen and Leake and Jacob's Precedents of Pleadings* (12th Ed), 1975 p 78 where it was stated that 'this rule enforces a cardinal principle of the system of pleadings that every allegation of fact in a statement of claim must be traversed specifically, otherwise it is deemed to be admitted … The effect of traverse, if properly pleaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is admitted or treated as admitted is that the party who makes it need not prove it. Thus, if the facts

pleaded in the statement of claim are admitted, there is no issue between the parties of the case which is concerned with those matters of fact and, therefore, no evidence is admissible in reference to those facts'; see *Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Seang & 4 Ors* [2008] 1 MLJ 27. Learned counsel for the plaintiff submitted further that our s 2(d) of the Contracts Act 1950 gives a wider definition of 'consideration' in that it enables consideration to move from another person than the promisee; see *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170. Section 41 of the Contracts Act 1950 was also referred to which states that if 'the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor'. From the facts in this case which I need not repeat, I am in agreement with the submission by learned counsel for the plaintiff that there was a valid contract between the plaintiff and the defendant upon the payment of aggregate sum of USD565,000 by the plaintiff being the plaintiff's capital contribution to Pindar in consideration of the defendant's representations and assurances. Hence when the property development undertaken through Chengdu Youlian had been completed which the defendant had not denied, the defendant is in breach of the contract when he failed and/or refused to honour his undertaking to realise the plaintiff's capital contribution and the share of profits upon the completion of the property development; s 41 of the Contracts Act 1950 is applicable.

[23] On the submission that the defendant did not traverse the fact alleged of a concluded contract, the defendant submitted that it was denied in the pleading. 'Traverse', according to *Black's Law Dictionary* means 'A formal denial of a factual allegation made in the opposing party's pleading.' Thus, when the defendant had denied the allegation of fact in the plaintiff's pleading, that prima facie constitutes the meaning of 'traverse' pertaining to pleadings; see O 18 r 13(2) of the Rules of the High Court 1980 (RHC) which provides that 'A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication'. However, O 18 r 13(3) of the RHC provides that 'Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them'. Rule 13(4) states that 'Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted'. In *Huo Heng Oil Co (Em) Sdn Bhd v Tang Tiew Yong* [1987] 1 MLJ 139 and *Fui Lian Credit & Leasing Sdn Bhd v Kim Leng Timber Sdn Bhd & Ors* [1991] 2 CLJ (Rep) 614, His Lordship Chong Siew Fai J (as he then was) in both these cases held that the general denial in a defence in an action for price of goods sold and delivered is bad in law, and the general pleas of 'does not admit' and 'put the plaintiff to strict proof thereof' in

the defences are not sufficient traverses. Looking at the facts specifically pleaded in the plaintiff's amended statement of claim vide para 14, although the plaintiff had pleaded that the sum of USD565,000 had been paid to the defendant in consideration of the defendant's said assurances and representations and in consideration of the 475,000 ordinary shares equivalent to 25% of the issued and paid up share capital of Pindar, it was not specifically asserted that a concluded contract was thereby founded. The defendant had vide para 8 of his amended statement of defence, not only denied but also averred that the payment of USD565,000 was to become shareholder of 475,000 shares in Pindar and the plaintiff had been duly registered as shareholders as well as having received the consideration. It is thus not a denial simpliciter. I find that the plaintiff's allegation of facts has been specifically traversed in the amended statement of defence and it is sufficient to satisfy O 18 r 13(3) of the RHC.

[24] On the question of fraud, the plaintiff submitted that given the circumstances that the plaintiff had assumed 25% share equity in Pindar, and in the events which had happened, the defendant had committed fraud on the plaintiff when he refused to honour his personal undertaking. The standard of proof for fraud in civil proceedings as decided by our Federal Court in *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 and *Asean Security Paper Mills Sdn Bhd v CGK Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1 is one that is beyond reasonable doubt. SP2 stated in evidence that the defendant had intended only to secure the plaintiff's financial support for Pindar's investment in China for the purpose only of obtaining for himself the profits from the property development at the expense of the plaintiff. He stated further that the defendant's assurances were false as everything was done to benefit himself, his children and his relatives from the way the defendant conducted the affairs of Pindar and Chengdu Youlian. Hence it was submitted that it is beyond reasonable doubt that there is a clear intention on the part of the defendant to deceive the plaintiff. From the facts of the case, as found by this court above that the defendant had given the assurances which included the undertaking that the plaintiff's capital contribution and share of the profit would be realised upon completion of the property development in China but had failed to honour his undertaking without any valid ground or explanation being adduced in court as to why such undertaking was not honoured, the irresistable inference to be drawn is that the defendant had willfully and/or intentionally failed or refused to honour his undertaking which leads to prove beyond reasonable doubt that he intended to deceive the plaintiff. This court would expect any prudent businessman to produce the account to prove any non-profit or losses to defend any claim for capital contribution and share of profits to be realised. The defence has never contended that the companies were not making profits nor that they were running at a loss. Again the irresistable inference which leads to prove beyond reasonable doubt is that the companies

were making profits but the defendant did not intend to share them with the plaintiff. I find that fraud is proved against the defendant.

[25] The plaintiff had also submitted on the fraud by the defendant as the party having de facto control of the companies herein this case stating that the defendant in his capacity as the managing director and majority shareholder of Pindar had appropriated the plaintiff's shares of profits arising from Pindar's investment in the property development undertaken by or through Chengdu Youlian where he was also the managing director; the defendant was also the person solely and fully responsible for all the affairs of Pindar and also Chengdu Youlian as well as in de facto control effectively and absolutely at all material times of both Pindar and Chengdu Youlian. It was further submitted that the defendant was a majority shareholder of Pindar holding 32.5% of the share equity while the remaining shareholders besides the plaintiff were his relatives holding 42.5% in Pindar. Learned counsel for the plaintiff submitted cases on the wrongdoer in de facto control of the company such as *Ting Chong Maa v Chor Sek Choon* [1989] 1 MLJ 477, *Tan Guan Eng v Ng Kweng Hee* [1992] 1 MLJ 487; *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417; [1995] 4 CLJ 551, where the Court of Appeal held, inter alia, that 'fraud on minority' had nothing to do with actual fraud or deception at common law and it is not necessary to prove dishonesty before a minority shareholder may claim relief under the doctrine; *The Bell Group Ltd (In liquidation) v Wetspac Banking Corporation (No 9)* [2008] WASC 239; 70 ACSR 1 (Australia) as cited by our Federal Court in *Takako Sakao* where Owen J held that an intention to deceive as in common law is not an ingredient of equitable fraud; equitable fraud being essentially 'unconscionable conduct in circumstances where there exists or is implied or imposed a relationship of trust or confidence.' The plaintiff submitted that the relationship of trust or confidence is born out in the long term friendship between the defendant and SP2 since 1968. Flowing from this relationship, the plaintiff submitted that the defendant being in de facto control over the affairs of Pindar, is a fiduciary to the plaintiff having the discretion or power to affect the plaintiff's legal or practical interest. The plaintiff contended that the rule in *Foss v Harbottle* [1843] 2 Hare 461; 67 ER 189 that the proper the plaintiff in an action in respect of a wrong alleged to be done to the company is prime facie the company itself, has no application in circumstances where the personal and individual rights of the shareholders have been invaded referring in support cases of *Edwards and Another v Halliwell and Others* [1950] 2 All ER 1064, *Daniels and Others v Daniels and Others* [1976] 1 Ch 406. There is no written submission in reply by the defendant. From the facts and evidence of this case, I find no doubt, in the absence of any evidence from the defendant to the contrary, that the defendant being the chairman and director and majority shareholder of Pindar as well as being managing director of Chengdu Youlian where Pindar held 80% share equity coupled with his assurances and his action of being in control of the affairs of the companies as evidenced by SP2, the

defendant was in de facto control of Pindar and Chengdu Youlian. As the relationship between the plaintiff and the defendant through their long standing dealings between property developer and architect respectively upon which element of trust and confidence was reposed coupled with the dealing in the instant case which involved money in capital contribution and in profit sharing, I find that the defendant owed a fiduciary duty to the plaintiff to safeguard the financial interests of the plaintiff. Evidence of SP2 showed that although in his numerous trips to the defendant's office in Chengdu, the defendant would say that the reports and financial statements would be sent to the plaintiff's office in Alor Setar, he had nevertheless failed to do so. In addition, the plaintiff had not been informed of SP2's removal as director of Pindar, that the defendant had caused no less than 70 units of shoplots developed through Chengdu Youlian to be registered in the names of his children and relatives, that the defendant had applied to deregister Chengdu Youlian, that whether any profits had been declared by Pindar or what was/is the status of Pindar, that there was no shareholders meeting except the one held on 28 August 1995 at Singapore, I find all these conduct of the defendant to be unconscionable conduct which establishes the essentials of an equitable fraud against the plaintiff. I do not agree with the defendant's submission that it should be the company and not the defendant as its chairman and director who should be liable on the basis of company law. My simple answer is that the fact of this case had shown the unconscionable conduct of the defendant who is the person in de facto control of the company as its alter ego. There is hence no question of setting an unprecedented precedent as each case will depend on its own fact. It is certainly not in every case that the chairman and/or managing director and/or director of a company must be personally liable for any wrong doing of their company. Learned counsel for the defendant failed to appreciate the distinction to submit on this point.

[26] The plaintiff had further submitted that the defendant is in breach of its legitimate expectation that the defendant would realise its financial contribution together with its share of profits on the property development (para 32 amended statement of claim) which the defendant had not responded vide his amended defence. It was submitted that the representations and assurances of the defendant do in fact furnish the basis or understanding that the plaintiff is justified to a legitimate expectation that its financial contribution and share of profits would be realised. The defendant as the managing director and as the person in de facto control of both Pindar and Chengdu Youlian is obliged to account to the plaintiff its share of profits. Learned counsel for the plaintiff cited *Company Law by Walter Woon* (2nd Ed), pp 177–180 where the learned author has quoted *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379 on the exercise of legal rights being subjected to equitable consideration ie the just and equitable concept; *Re Posgate & Denby (Agencies) Ltd* [1987] BCLC 8, 14 on the concept of unfair prejudice which enables the court to take into account the members legitimate expectation

arising from the agreements or understandings of the members inter se; *Re Norvabron Pty Ltd (No 2)* (1986) 11 ACLR 279, 292 where the Supreme Court of Queensland held the view that for the determination of the rights, expectations and obligations inter se of the persons behind it, a company is more than a mere judicial entity, and those rights are not necessarily merged into its structure; and the case of *Re A Company (No 00370 of 1987)*, exp *Glossop*[1988] BCLC 570, 579 which canvassed the principle that it is unfair to the minority if the majority receive large sums of money from the company while they get nothing. I would say that it is universal for every shareholder who invests in a company to expect a share of the profit in return unless it is a case of charity. I do not find any variance in the case of the plaintiff that it had that legitimate expectation to share the profits on the investment by Pindar in the China property development through Chengdu Youlian upon its completion.

[27] From all the facts and evidence of the plaintiff for which this court is duty bound to accept as true in the absence of any evidence from the defendant going the other way and drawing an adverse inference against the defendant (see *Takako Sakao*), this court holds that the plaintiff had proved on a balance of probabilities that the defendant had made his personal representations and the assurances to the plaintiff through its chairman and director, SP2 upon which the plaintiff had taken up 25% share equity in Pindar and that the defendant was in breach of his assurances including his undertaking when he failed to honour them. I also find that the plaintiff had proved beyond reasonable doubt that the defendant had committed personal fraud on the plaintiff as well as he had, in law, committed equitable fraud by his unconscionable conduct as submitted by learned counsel for the plaintiff and accepted by this court. With that, I reject the defendant's submission of no case to answer and will move on to consider the issue of damages.

[28] The plaintiff had submitted basically on two heads of damages ie special damages and exemplary damages. For special damages, the plaintiff claimed for the sum of USD565,000 being the aggregate sum of the financial contributions for the 25% share equity in Pindar and a sum of no less than USD2.5m being the plaintiff's share of profits from Pindar's investments in the property development proportionate to the plaintiff's 25% share equity. As this court has found above that the defendant had given the representations and assurances including the undertaking that the plaintiff's capital contribution and share in the profits upon the completion of the property development and at least the plaintiff's capital contribution would be realised in the event that the property development is not completed for whatever reasons, but the defendant had failed to honour his undertaking, I hold that the plaintiff is entitled to claim this sum of USD565,000 from the defendant. The defendant contended that the plaintiff was issued 475,000 ordinary shares in Pindar as

consideration for the payment by the plaintiff of that sum and to allow the plaintiff to claim this said sum would be to enrich him as the plaintiff would be obtaining back its capital contribution and at the same time still retaining the number of shares. The facts that the plaintiff had held the shares certificates is not disputed but the plaintiff's case was based on the foundation of the contract between the plaintiff and the defendant upon and in consideration of the defendant's representations and assurances. As to the 475,000 shares held by the plaintiff, there is no evidence of the value of them or whether they still carry any monetary value. Thus, there is no basis for the defendant to contend as he did since he did not adduce any evidence to suggest any value of the 475,000 shares in the hand of the plaintiff.

[29] The plaintiff's claim for USD2.5m as special damages is worked out based on exh P12, the defendant's handwritten profit and cost analysis of the proposed property development, income from the sale and construction cost in respect of the proposed development comprising four storey and six storey shophouses and his personal adjustment which he gave to the plaintiff but taking into account the actual development covering four storey and two storey shophouses.

[30] SP2 computed the sum of USD2.5m in the following manner using the defendant's own analysis of the cost and profits that he anticipated or estimated:

(a) for development comprising four storey shophouses, the defendant had estimated the profit to be RMB89,215,200 equivalent to about USD13,579,178 at the exchange rate of 1 USD to RMB6.57. The plaintiff's share would then be USD13,579,178 x 80% x 25% = USD2,715,835.50; and

(b) for development comprising six storey shophouses, the defendant estimated the profits to be RMB94,096,600 equivalent to about USD14,322,161 at the aforesaid same rate of exchange. However, taking into account that the final development completed comprised of the scaled down shophouses from six storey to two storey, the projected profits are reduced to 1/3 of the defendant's projected profits which worked out to be RMB31,365,533.33 or USD4,774,053.60. The plaintiff's share would thus be USD4,774,053.60 x 80% x 25% = USD954.810.70.

[31] Adding (a) and (b) above, the plaintiff's claim here would be USD2,715,835.50 + USD954,810.70 = USD3,670,646.20. However, the plaintiff seems to claim a reduced sum of USD2.5m. Learned counsel for the defendant submitted that this P12 does not show the actual profits earned and cannot be relied upon. He also submitted that P12 did not create any contract between the plaintiff and the defendant to enable the plaintiff to claim loss of profits from the defendant. The defendant's own computation vide P12 undoubtedly is his forecast or estimate of the probable profits. However, if the defendant attempts to contend or is contending that his computation is inaccurate or is not the actual profit, I find no valid reason why no statements of account or profit and loss account which were within his knowledge and access were not even enclosed in the bundle of documents to refute P12 and to clarify the actual account. Moreover, the defendant being appraised with the actual fact had failed to testify to dispute his own computation of profits vide P12. In such circumstances, it is only appropriate to draw an adverse inference under s 114(g) of the Evidence Act 1950 against the defendant that any account of this said property development, if produced would not be favourable to the defendant. The plaintiff through SP2 had been assertive that the defendant had failed to provide and/or remit any financial reports of the companies throughout. Hence it is reasonable to draw an inference that the plaintiff does not have any actual account except P12 to enable the plaintiff to make the computation of the probable profits which they are entitled to in accordance with their share equity which the defendant had given this assurances and undertaking. I find that the plaintiff has shown the basis for relying on P12 to compute the share of profits. On the defendant's submission that P12 does not form a contract between the plaintiff and the defendant, I find this is non issue upon the finding of this court above as to the existence of a contract based on the defendant's representations and assurances inclusive his undertaking. P12 was used as the plaintiff's basis for the computation of its share of the profits and there is no question of it being a contract between the parties. Consequently, I hold that the plaintiff's computation of the probable share of profit using the defendant's estimate as the basis which is not rebutted is reasonable on a balance of probabilities and the sum of USD2.5m is fair account taking into account of any contingencies.

[32] In *Rookes v Barnard* [1964] AC 1129the House of Lords had limited the award of exemplary damages to only exceptional categories of cases namely (i) where the conduct is calculated to make or to result in a profit (ii) where there is oppressive conduct by government servants and (iii) where there is express authorisation by statute. Lord Devlin held the view that:

> Where a defendant with a cynical disregard for a plaintiff's right has calculated that the money to be made out of his wrong doing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity,

see also *Broome v Cassell & Co Ltd* [1972] AC 1027. The plaintiff submitted that under the heading of exemplary damages, the resources of the defendant would be a relevant consideration citing *Kris Angsana Sdn Bhd v Eu Sim Chuan & Anor* [2007] 5 MLJ 13; [2007] 4 CLJ 293 (CA) and referring to *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610; [2009] 5 CLJ 1 (CA), the plaintiff submitted exemplary damages at 10% of the compensatory damages which is of not less USD250,000 would be a fair and reasonable sum. Judging the facts and evidence of this case, I find that the breach of the defendant towards the plaintiff and that the defendant's failure to account the share of profits of the plaintiff is probably none other than to calculate to make or to result in a profit to the defendant at the expense of the plaintiff. I find it appropriate to award exemplary damages in this case. His Lordship James Foong JCA (now FCJ) has listed out the various factors to be considered by the court in awarding exemplary damages in *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh bin Mamat & Ors* as follows:

> Basically, the law sets down that this category of damages if awarded, should be moderate and the resources of the parties must be taken into account. Other factors to be considered are the quantum of compensatory award as well as the conduct of the parties right down to the time of judgment. The gravity of the wrong is also another item to be taken into account. These are spelled out in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn*.

[33] Having taken into consideration the evidence as a whole in this case and the relevant factors as listed out above, I am of the view that a sum of USD200,00 would be a fair and reasonable sum to be awarded to the plaintiff as exemplary damages; this sum is moderate and not excessive but sufficient to serve its punitive purpose.

CONCLUSION

[34] For the foregoing reasons and findings, I allow the plaintiff's claim as in the amended statement of claim (bundle A pp 97–100) at para 38A for prayer (i); prayer (ii) with interest at 8% from date of judgment to realisation; prayer (iii)/(iv) that the defendant do pay to the plaintiff the sum of USD2.5m or its equivalent in Malaysian Ringgit as at the date of this judgment hereunder, being the plaintiff's share or entitlement to the profits from Pindar's investment in the property development undertaken through Chengdu Youlian proportionate to the plaintiff's 25% share equity, with interest at 8% from the date of this judgment to the date of realisation; prayer (vii) exemplary damages

in the sum of USD200,000 or its equivalent in Malaysian Ringgit at the date of this judgment. Costs of RM25,000 is awarded to the plaintiff.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum